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Private Law: Successions and Donations

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accordance with the recorded plat.[36] However, the actual opening of the streets by the municipality is not a "ministerial duty required by law" and, in the absence of any abuse of discretion in the refusal to open any of these streets, mandamus does not lie to force such action.[37]

In *Jefferson Parish School Board v. Assets Realization Co.*,[38] there was a resolution which formally dedicated "all streets, avenues, highways, drives, drainage canal areas, and etc., as shown hereon." The fact that the plat contained a square marked "Reserved for Schools" was held not sufficient to show a deliberate intent to dedicate because it was also consistent with the possibility of sale or other transfer for school purposes. However, there was enough difference in *Best Oil Co. v. Parish Council of the Parish of East Baton Rouge*[39] for the court to find an unequivocal intent to dedicate a drainage canal area in accordance with its location on a map.

SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

VALIDITY OF TESTAMENTS

Form

It now seems to be the generally accepted rule that an olographic will dated in the slash form which is uncertain as to the day, month, or year[1] is invalid, and that no extrinsic evidence is admissible to resolve the uncertainty.[2] This rule was

36. No mention is made of the Supreme Court decision to the same effect: Parish of Jefferson v. Doody, 247 La. 839, 174 So. 2d 798 (1965), and comments in 26 LA. L. REV. 467-68 (1966).

37. LA. CODE OF CIVIL PROCEDURE arts. 3861 *et seq.* (1960).

38. 182 So. 2d 818 (La. App. 4th Cir. 1966).

39. 176 So. 2d 630 (La. App. 1st Cir. 1965), *writ refused*, 248 La. 365, 178 So. 2d 656 (1965).

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1. It must be conceded that there is no uncertainty in a slash date such as 12/12/60, 8/8/60, 9/13/60. Whether the first date is 12 December or December 12, makes no difference. The same applies to the second illustration. As to the third, it can only mean September 13th, for there are only 12 months in the year. As to the century, see Succession of Kron, 172 La. 666, 135 So. 19 (1931).

2. For a critical review of the jurisprudence on this question see Successions of Gaudin, 98 So. 2d 711 (La. App. 1st Cir. 1957); 140 So. 2d 384 (La. App. 1st Cir. 1962), noted and discussed in *The Work of the Louisiana Appellate*

recently re-affirmed in *Succession of Gafford*,[3] but it is interesting to note that although the date in question (10/3/60) was patently ambiguous, the court nevertheless finds that it is a date certain and that it means October 3, 1960; and this, without resorting to extrinsic evidence but solely by reference to the several documents offered for probate. In his olographic testament dated March 23, 1951, the testator had appointed Molly Flanagan as his executrix and instituted her as his universal legatee. Thereafter, the testator changed the date of the will to September 14, 1960, and at the same time substituted Frank Mathews as his executor and universal legatee explaining on the reverse of the testament that these changes were necessitated by the death of Molly Flanagan. In addition to this will, there was also offered for probate as a codicil thereto, an addendum containing particular legacies bearing the questionable date "10/3/60," in which the testator directed Frank, the substituted executor, to pay the legacies therein made. This codicil was promptly attacked as invalid under the rule above stated. It was an easy matter for the court to conclude that the date on the codicil had to be October 3, 1960, for it was impossible for it to have been executed before September 14, the date on which the changes in the original will had been made.[4]

Article 1579 of the Civil Code provides that if the testator declares that he does not know how or cannot sign the nuncupative will by public act, the notary must make express mention of this declaration in the act of superscription as well as of the cause that prevents the testator from signing.[5] In *Stelly v. Stelly*,[6] the opponents of the will alleged its invalidity on the

Courts for the 1961-1962 Term — Successions and Donations, 23 LA. L. REV. 266 (1963). See also *The Work of the Louisiana Appellate Courts for the 1964-1966 Term — Successions and Donations*, 26 LA. L. REV. 468 (1966).

3. 180 So. 2d 74 (La. App. 2d Cir. 1965).

4. "If the slash date on the codicil is read as March 10, 1960, it would mean that the codicil was drafted prior to the death of Molly * * * and prior to the alterations of the testament, and such an interpretation would be inconsistent with the testator's intention as clearly stated and unchanged before September 14, 1960. However, if the slash date is read as October 3, 1960 this construction gives to the codicil meaning. Manifestly then, it would have been drafted subsequent to the death of Molly * * * which necessitated the changes in the will as first written." *Id.* at 77.

It will be noted that but for the fact that the codicil directs Frank, the new executor appointed on September 14, 1960, to pay the particular legacies in question, the codicil might well have been declared null.

5. LA. CIVIL CODE art. 1579 (1870): "[The nuncupative testament by public act] must be signed by the testator; if he declares that he knows not how, or is not able to sign, express mention of his declaration, as also of the cause that hinders him from signing, must be made in the act."

6. 175 So. 2d 829 (La. App. 3d Cir. 1965).

grounds that (1) the notary "did not test the ability of the testatrix to sign her name in the presence of all the witnesses as required by Article 1578 of the Civil Code," and (2) that the act of superscription did not satisfy the requirements of article 1579 of the Civil Code. Both of these objections were summarily rejected by the court. As to the first, there is nothing in article 1578 that requires the notary to "test the ability of the testator" to sign his name in the presence of witnesses.[7] As to the second, the act of superscription prepared by the notary was to the effect that the testatrix declared that although she knew how to read and write, she was then unable to sign her name due to her illness, and that if she attempted to sign, the signature would be illegible. Such a statement, the court properly concludes, fully satisfies the provisions of the Code.[8]

The purpose of the Civil Code articles prescribing the formalities which must be observed in the confection of testaments is undoubtedly to guard against imposition, fraud, or deception, and it is clear that nothing short of strict compliance with these formalities will satisfy the requirements of the law.[9] There is no reason why this rule should not also be extended and applied to the statutory will authorized by section 2442 of title 9 of the

7. This article merely sets forth the requirements as to how this testament must be dictated and received by the notary in the presence of the necessary number of witnesses, observing that these formalities must be fulfilled at one time without interruption.

8. This is in accord with prior jurisprudence to the effect that article 1579 calls only for a statement of the cause that hinders the testator from signing, and that the notary is not required to set forth in detail the nature of such cause. See Succession of Davis v. Richardson, 226 La. 887, 77 So. 2d 524 (1955) where the declaration was simply that the testatrix was unable to sign "due to her physical condition."

In the case under consideration, the notary's declaration is actually more descriptive of the cause that hindered the testatrix from signing.

9. LA. CIVIL CODE art. 1595 (1870): "The formalities to which testaments are subject by the provisions of the present section, *must be observed*; otherwise the testaments are null and void." (Emphasis added).

In the following cases the testaments were declared null because the formalities required for each had not been strictly observed: Succession of Vidal, 44 La. Ann. 41, 10 So. 414 (1892) (nuncupative will by public act); Vernon v. Vernon's Heirs, 6 La. Ann. 242 (1851) (nuncupative will by private act); Stafford v. Villain, 10 La. 319 (1836) (mystic will); Succession of Armant, 43 La. Ann. 310, 9 So. 50 (1891) (olographic will). The writer has discovered but one case in which this principle went apparently unnoticed. See Condon v. McCormick, 134 So. 2d 619, 626 (La. App. 3d Cir. 1961) in which a nuncupative will by private act was upheld although it was apparent that the formalities prescribed by articles 1581 and 1582 of the Civil Code had not been strictly adhered to, the court concluding that there had been a "substantial and sufficient compliance" with the provisions thereof. See criticism of this case in *The Work of the Louisiana Appellate Courts for the 1961-1962 Term — Successions and Donations*, 23 LA. L. REV. 266 (1963), and *cf.* Vernon v. Vernon's Heirs, 6 La. Ann. 242 (1851).

Louisiana Revised Statutes,[10] especially in view of the mandatory provisions thereof, and this was particularly emphasized by the Second Circuit Court of Appeal in *Succession of Michie*,[11] in which the purported statutory testament was neither signed at the conclusion thereof as provided by law,[12] nor did it contain the required act of superscription or attestation clause that the notary must make.[13] As the court pointed out, although the statute provides that the attestation clause need not be in the exact language of the statute but that it may be in a form substantially similar thereto, nevertheless an attestation clause is certainly required and without it, the testament is null.[14]

Capacity To Give and To Receive

Article 1489 of the Civil Code provides that ministers of the gospel are incapable of receiving donations inter vivos or mortis causa from those whom they have attended during the sickness of which they die, when such donations are made during that sickness. The case of *Coleman v. Winsey*[15] raises the interesting question whether article 1489 is applicable where the donor who has suffered from chronic hardening of the arteries for a considerable period of time prior to his death, makes a donation during such period but more than one year prior to his fatal heart attack.[16] The opinion of the court is that arteriosclerosis

10. LA. R.S. 9:2442 (1950), as amended by La. Acts 1964, No. 23.

11. 183 So. 2d 436 (La. App. 2d Cir. 1966).

12. Although the statute is susceptible of the construction that the will must be signed by the notary, the testator and the witnesses at the conclusion of the dispositive provisions, and that it must again be signed by them following the act of superscription prepared by the notary, the Supreme Court had held that all that the statute requires is that the signature of the testator, of the notary, and of the witnesses be affixed in the presence of each other under the attestation clause. Succession of Eck, 233 La. 764, 98 So. 2d 181 (1957); Succession of Nourse, 234 La. 691, 101 So. 2d 204 (1958).

13. In the will in question, the signatures of the witneses and of the testator appeared at the end of the dispositive provisions, following which was the notary's certification that the testator's signature was authentic. It was apparent, therefore, and it was conceded that the testament lacked the necessary attestation clause.

14. It has been previously observed that because of the comparatively few requirements imposed, it should not be too difficult for a competent notary to properly observe and comply with these requirements. See *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Successions and Donations*, 24 LA. L. REV. 184, 186 n. 7 (1964). And it is regrettable that in *Michie, supra*, where more than one-half million dollars was involved, the will of the deceased could not be carried out. But, as the court indicates, the fault lay not with the law, but with the deceased himself who failed to avail himself of competent professional advice and assistance.

15. 183 So. 2d 118 (La. App. 1st Cir. 1965).

16. It is shown that the will was made on April 8, 1960, and that the deceased died on March 8, 1961. *Cf.* Succession of Price, 172 La. 606, 612, 134 So. 907, 909 (1931) in which the deceased died more than one year after making her

is a degenerative disease related to the aging process in which heart failure is a distinct probability, but that it does not necessarily constitute the last sickness of the deceased within the meaning of article 1489 of the Code, especially where it is shown that the donation was made long before the fatal attack and that the deceased required no special medical treatment prior to his death. It is strongly intimated that in such cases the cause of death is the fatal heart attack and not the chronic arteriosclerotic condition of the deceased.[17]

In *Succession of Bisso*,[18] where the testamentary capacity of the deceased was attacked on the grounds of insanity, the court found the evidence insufficient to show that the testator was insane at the time the will was confected, although there was ample testimony to show that for a time prior to his death his behavior was such as to attest to an irrational mind. Accordingly, the will was declared valid, the court taking occasion to reiterate the prior jurisprudence to the effect that the fact that the deceased is in poor physical condition and may be suffering from diseases generally attendant upon the aged and infirm, is not sufficient to deprive him of his right to make testamentary dispositions.[19]

Animus Testandi

In two cases, *Succession of Gafford*[20] and *Succession of Ham-*

will and in which the court simply states: "In the case at bar, the last will and testament was made May 4. 1925 and the testatrix did not die until May 13, 1926. Article 1489 of the Civil Code *is not applicable therefore* to the legacy made by the testatrix in favor of Rev. H. C. Smith." (Emphasis added.) *Cf.* LA. CIVIL CODE arts. 3199, 3200, 3201 (1870) (re: privilege for expenses at last sickness).

17. "There is no question but what the will in this case was written long before the fatal heart attack, or the *heart failure that caused the patient's death*, and there is no evidence in the record which indicates that for a period of ten months prior to the death of the testatrix she needed medical treatment of any kind. When treated by the doctor some two months after the will was written she apparently was in no worse condition than she was on his first visit in July of 1959.

"The plaintiff's theory of the case is that once a person is diagnosed as having hardening of the arteries, if that person ever dies as a result thereof, making a minister or doctor who had administered to her a legatee under the will would be prohibited. *This is an extension of Article 1489 which is not warranted.*" (Emphasis added.) 183 So. 2d 118, 121.

18. 186 So. 2d 692 (La. App. 4th Cir. 1966), *cert. denied*, 249 La. 705, 190 So. 2d 229 (1966).

19. See Succession of Prejean, 224 La. 921, 71 So. 2d 328 (1954) to the effect that the fact that a person is suffering from arteriosclerosis, high blood pressure, hypertension and is 86 years of age and has had a heart attack is not sufficient to show that he was mentally incompetent to make a will.

20. 180 So. 2d 74 (La. App. 2d Cir. 1965).

mett,[21] the olographs of the deceased offered for probate were attacked as lacking testamentary intent.[22] In both, the opponents relied on the recent decision in *Succession of Shows*[23] in which it is intimated that in order to be valid as a will, the document must contain certain magic words of disposability. In *Gafford*, the dispositions were in the following form: "Frank, in settling my estate my instructions are as follows — Pay to * * * $10,000 each. * * * The balance to be paid to my first cousins. * * * The diamond rings * * * I will to Ruth * * *." The court concluded that the words "pay to" sufficed as testamentary dispositive words. In *Hammett*, the dispositions were as follows:

> "75% of all [of testator's property] to Sam * * * to be held in trust * * * until Sam is 35 years old.
>
> "25% of all [of testator's property] to James H. Atkinson.
>
> "Donald Albert Hammet is no longer my husband and I leave him nothing."

For the opponents, it was contended that even if the word "leave" appearing in the last paragraph of the document actually satisfied the requirement of clearly indicating an animus testandi, that the same could not be said of the first two paragraphs. Although the court construes the word "leave" as a dispositive word,[24] it seems to favor a rule of construction that would require a consideration of the instrument as a whole on its own merits and a determination whether the testator intended it as the vehicle for the transmission of his property upon his death. It therefore holds that, considering the document taken as a whole, it clearly indicated that the deceased intended to con-

21. 183 So. 2d 416 (La. App. 4th Cir. 1966).

22. The contention being that neither of the documents contained words of disposition such as *I will, bequeath, or devise*, etc.

23. Succession of Shows, 246 La. 652, 656, 166 So. 2d 261, 263 (1964) noted in 25 LA. L. REV. 310, 313 (1965) in which the purported testament was simply as follows: "All to my sister," and wherein the Supreme Court held it was not a will because it "totally lacked any language to indicate the animus testandi of the decedent and the necessary words to constitute a valid will." In the opinion rendered by the court of appeal (158 So. 2d 293, 296) the following is quoted with approval from Succession of Foggard, 152 So. 2d 627 (La. App. 2d Cir. 1963): "Nor does the instrument contain the words 'give,' 'donate,' 'will,' 'bequeath,' 'devise,' or any other word establishing or even indicating that it is a disposition of a last will."

24. "This document contains the word 'leave.' One trained in the law might prefer the use of words such as 'bequeath' or 'devise,' but we are dealing with a document written by a person not so trained, and certainly 'leave,' when used by a layman, indicates the necessary intent." 183 So. 2d 416, 418.

vey her property in the manner indicated upon her death, and that therefore, it constituted her last will and testament. To this writer this seems a sounder approach, for there is no mandatory requirement in the legislation that a testament must contain particular words of disposition. On the contrary, in the language of the Code, it suffices that "the clauses it contains or the manner in which it is made, clearly establish that it is a disposition of last will."[25] And it is suggested that a document can be a valid testament and can be construed only as such, even if it contains none of the so-called words of disposition. Take for example the olograph in *Gafford, supra*, containing the testatrix's instructions to her executor as to the manner of "settling" her estate.[26]

DONATIONS AND TESTAMENTARY DISPOSITIONS

Disposable Portion and Légitime

Articles 1493-1496 of the Civil Code clearly indicate that the patrimony of a person leaving forced heirs is divided by operation of law into two parts, one of which is freely alienable and of which he may dispose gratuitously in favor of anyone, and the other which must be reserved for the forced heirs and which is and must remain essentially inalienable[27] in the sense that it is protected by law against gratuitous inter vivos or testamentary dispositions, for it must descend to the forced heirs in full ownership, free of any charges, conditions, or restrictions.[28] It follows,

25. LA. CIVIL CODE art. 1570 (1870): "No disposition mortis causa shall henceforth be made otherwise than by last will or testament. But the name given to the act of last will is of no importance, provided that the clauses it contains, or the manner in which it is made, clearly establish that it is a disposition of last will."

26. *Cf.* Succession of Ehrenberg, 21 La. Ann. 280 (1869); and see Succession of Torlage, 202 La. 693, 12 So. 2d 683 (1943).

27. LA. CIVIL CODE art. 1493 (1870): "Donations inter vivos or mortis causa cannot exceed two-thirds of the property of the disposer, if he leaves at his decease a legitimate child . . . ."

LA. CIVIL CODE art. 1495 (1870): "In the cases prescribed by the two last preceding articles, the heirs are called forced heirs, *because the donor cannot deprive them* of the portion of his estate *reserved to them by law*. . . ." (Emphasis added.)

LA. CIVIL CODE art. 1496 (1870): "Where there are no [forced heirs] . . . donations inter vivos or mortis causa may be made to the whole amount of the property of the disposer . . . ."

LA. CIVIL CODE art. 1498 (1870): "The legitimate portion of which the testator *is forbidden to dispose* to the prejudice of his descendants being once fixed by the number of children living or represented . . . does not diminish by the renunciation of one or any of them. . . ." (Emphasis added.)

28. LA. CIVIL CODE art. 1710 (1870). Exception is made, of course, where the legitime of forced heirs may be burdened with a usufruct by operation of law. See LA. CIVIL CODE arts. 915, 916 (1870); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888); Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957).

therefore, that the right to the legitime is a right arising *ab-intestato* which cannot be controlled, limited, nor qualified by any disposition of the testator.[29]

The disposable portion, on the other hand, may be freely disposed of gratuitously in favor of any person, and it may even be given to one or more of the forced heirs of the donor.[30] Nevertheless, because the equality that the law requires must be observed among the heirs of the donor,[31] when the disposable portion or a part thereof has been given to one or more of the forced heirs, it must be returned to the mass of the succession to be divided equally among all of them, except where it has been given as an extra portion or where the donee has renounced the succession in order to keep his donation.[32] These principles could not have been better illustrated than in *Succession of Williams*,[33] where the testatrix made a bequest of all her property to the children of her only son, subject to a usufruct in favor of the latter. Since there was one forced heir, it was clear that she was *prohibited* from disposing of more than two-thirds, and that the legitime of one-third must descend to her child *ab-intestato* in full ownership, free from any charges, conditions, or restrictions. What the testatrix had a right to dispose of, therefore, and what she actually bequeathed, was the naked ownership of two-thirds of her succession in favor of her grandchildren and of the usufruct thereon in favor of the child. The judgment awarding the son his legitime of one-third in full ownership as well as the legacy of the usufruct of the disposable portion was eminently correct.[34]

29. Succession of Turnell, 32 La. Ann. 1218 (1880).
30. LA. CIVIL CODE art. 1501 (1870).
31. *Id.* arts. 1228, 1229.
32. *Id.* arts. 1231, 1501, 1237.
33. 184 So. 2d 70 (La. App. 4th Cir. 1966).
34. The *Williams* case, *supra*, has been criticized on the grounds that it "contravenes the *normal rule* that a forced heir cannot claim both the légitime and a testamentary bequest," and that "no support for [the decision] other than two Louisiana cases" was offered by the court. See Note, 41 TUL. L. REV. 210, 213 (1966).

It is true that in Miller v. Miller, 105 La. 257, 29 So. 802 (1901) and in Succession of Fertel, 208 La. 614, 23 So. 2d 234 (1945), on which the author of the note in the *Tulane Law Review* relies, the court concluded that the legacy to the forced heir had to be imputed to the reserved portion and that therefore, he could not claim the legacy in addition to this legitime. But it must be noted that the reason for this conclusion was that this was clearly found to be the unequivocal intention of the testator, and not because such was the *normal rule of law*. Thus in *Miller*, the court states: "All we are called to do is to ascertain [the testator's] intentions and enforce them. We think *his intention and wish are clear*, that the whole estate, less $20,000 to be first paid to the minor, should vest in his other children share and share alike. . . ." (105 La. at 261, 29 So. at 804).

Life Insurance and Annuities

It seems to have been firmly established by the jurisprudence that the proceeds of life insurance payable to a designated beneficiary other than the estate of the insured form no part of the succession of the insured, but inure to the named beneficiary directly and by the sole terms of the policy itself; but that the unpaid balance of an annuity contract payable to a designated beneficiary surviving the annuitant forms part of the succession of the latter, with the resulting differences that in the one case, such unpaid balance must be included in the mass for the purposes of determining legitime and the disposable portion, but not in the other.[35] In 1944, however, the legislature enacted a statute providing that "all proceeds, avails and dividends of all policies of health and accident insurance, *annuity insurance* and endowment insurance, shall in every respect and for all purposes have and enjoy the same legal status" then accorded to the proceeds of life insurance,[36] the obvious purposes being to abolish the

"It was *evidently his desire* that his entire property, less $20,000 should be bequeathed to his children, and not to his grandchild; *that the grandchild should not receive more than $20,000.*" (Emphasis added.) 105 La. at 265, 29 So. at 805. And in *Fertel*, the court states: "The contention of Barney Fertel that he should be awarded, in addition to his legitime, the legacy of $100 per month to be paid out of the disposable portion, is discussed in the opinion of the trial court which we have hereinabove quoted. As is *correctly shown* in the opinion, it is obvious that *it was not the intention of the testatrix* to give Barney Fertel the legacy of $100 a month in addition to his legitime. . . ." (Emphasis added.) 208 La. 614, 637, 23 So. 2d at 241.

It must be conceded that in an intestate succession, where a donation has been made to one of the forced heirs and is not otherwise exempt from collation, the donee may elect to keept the donation only if he renounces the succession of the donor. LA. CIVIL CODE art. 1237 (1870). It must also be conceded that gratuitous dispositions in favor of third persons, whether inter vivos or testamentary, must be imputed to the disposable portion for the reserved portion of the forced heir must remain intact. Again, it is also clear that such gratuitous dispositions when made in favor of one of the forced heirs are generally imputed to the reserved portion unless declared to be made as an advantage or extra portion. *Id.* art. 1228. In other words, as against his coheirs, a forced heir cannot keep his donation inter vivos in addition to his legitime unless the donation was expressly declared to have been given as an extra portion. By the same token, he cannot "claim his legacy" in addition to his legitime, unless the legacy was likewise intended as an extra portion. That the declaration that the donation is exempt from collation or that it is made as an extra portion need not be expressly made when the donation is mortis causa, and that therefore, the question whether the legacy will be imputed to the disposable portion or to the legitime will be resolved in favor of the heir-legatee, *unless the testator has expressed a contrary intention*, should be the deciding factor. *Cf.* Jordan v. Filmore, 167 La. 725, 120 So. 275 (1929). Thus, in a contest among forced heirs, the legacy should always be imputed to the disposable portion in all cases where the testator has not declared otherwise. In *Williams, supra*, to whom would the legacy of the usufruct of the disposable quantum had gone if not to the forced heir?

35. Sizeler v. Sizeler, 170 La. 128, 127 So. 388 (1930); Succession of Rabouin, 201 La. 227, 9 So. 2d 529 (1942).

36. La. Acts 1944, No. 221.

distinction theretofore made by the courts. The statute was in effect until expressly repealed by the Louisiana Insurance Code of 1948.[37] And although in *Succession of Pedrick*[38] the statute was held inapplicable because it was not in effect at the time of the annuitant's death, it is clear that, at least in those cases where the unpaid balance of the annuity contract has become exigible during the life of the statute, such unpaid balance should be treated in the same manner as proceeds of life insurance payable to third-party beneficiaries. The Second Circuit Court of Appeal so held in *Succession of Lantz*,[39] in which the court ruled that as between the beneficiary of the unpaid balance of the annuity and his coheirs, such unpaid balance passes to him, not *ab-intestato*, but as the beneficiary thereof under and by virtue of the terms of the contract.

Collation

That manual gifts were per se exempt from collation was evidently the theory of the plaintiffs' case in *Succession of Browne*[40] in which they sought to bring back into the succession of the deceased alleged donations inter vivos in the form of manual gifts to one of the donor's children. As to one of these items (a $10,000 check given by the donor to her son-in-law to remodel his home into which the donor had moved permanently) the court found the gift to have been used solely for the benefit and convenience of the donor and consequently not subject to collation.[41] The same was true also of the second item which consisted of approximately $3,000 that the donor's daughter had expended for groceries, clothing, and other articles for the personal use of the donor. The third item consisted of household furniture and appliances valued at some $726 which the donor had given to her daughter but which the court concluded was a gift such as was usual for parents to give to their children without regard to an accounting therefor, and consequently not subject to collation. Though there is language in the opinion from which one may infer that a manual gift would, as such, be regarded as exempt from collation,[42] it is evident that the court's

37. La. Acts 1948, No. 195. As far as the writer has been able to determine, the statute has never been re-enacted.

38. Succession of Pedrick, 207 La. 640, 21 So. 2d 859 (1945).

39. 176 So. 2d 224 (La. App. 2d Cir. 1966).

40. 176 So. 2d 217 (La. App. 2d Cir. 1965).

41. The court also points out that in no event was this gift subject to collation inasmuch as it was not a gift to one of the donor's heirs.

42. See for example the following: "As to the first of the enumerated items,

decision is in accord with the position of the Supreme Court in *Succession of Gomez*,[43] wherein the court categorically states that manual gifts are not per se exempt from collation.

In *Succession of Delesdernier*,[44] the court reiterates the jurisprudential rule that collation cannot be demanded after a judgment sending the heirs into possession,[45] except of course where the judgment of possession is itself a nullity. As to valid donations made by the deceased to the coheirs of the plaintiff, therefore, the petition for collation was held to come too late since a

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the [lower] court held that the $10,000 was a *manual gift* to Morris L. Witten *and observed* that in no event was it subject to collation inasmuch as Witten was not one of Mrs. Browne's heirs. . . . The conclusion that Mrs. Browne's check to Witten represented a manual gift of the fund is, in our opinion, correct. Nor do we find any error in the observation that in no event could the gift be subject to collation."

43. *Id.* at 219. 223 La. 859, 67 So. 2d 156 (1953). *Cf.* LeBlanc v. Volker, 198 So. 398, 401 (La. App. Orl. Cir. 1940) where the court states: "A manual gift is not subject to collation. . . . The transfer of the homestead stock in this case, was, in view of the provisions of the Uniform Stock Transfer Statute, a valid donation inter vivos, but it is, nevertheless, the subject of collation, *since it is not and could not be the subject of a manual gift.*"

44. 184 So. 2d 37 (La. App. 4th Cir. 1966).

45. The rule seems to be based on the proposition that since collation is due only to the succession of the donor, once the succession has been closed by the rendition of a judgment of possession, collation is no longer possible. In Doll v. Doll, 206 La. 550, 560-61, 19 So. 2d 249, 252 (1944), in which the rule seems to have had its inception, the court states: "If the descendant heirs of a deceased person accept his or her succession unconditionally and obtain a judgment sending them into possession of the estate as owners, and thus close the succession, *the heirs are thenceforth co-proprietors of the property theretofore belonging to the succession* in the same manner as if they had acquired their joint ownership by *purchase instead of acquiring* it by inheritance."

There appears to be no justification for the rule in *Doll v. Doll.* (1) The concept of a succession as a fictitious entity which represented the deceased until delivery of the effects thereof to the heir and which became part of the Louisiana law through Las Siete Partidas (Partidas 6.14.1; La. Civil Code of 1808, p. 162, art. 74) was discarded in favor of the French doctrine *"le mort saisit le vif"* in the Code of 1825. (2) The succession is acquired by the heir immediately upon the death of the deceased by operation of law (LA. CIVIL CODE art. 940 (1870)) who is considered as having succeeded to the deceased from the instant of his death (*id.* art. 944). (3) The judgment of possession merely *recognizes* the heir as the owner, and he *acquires nothing by the judgment* which only sends him into possession of what is his already by operation of law. (4) A judgment of possession is not a judgment translative of ownership and cannot form the basis for acquisitive prescription. Tyler v. Lewis, 143 La. 229, 78 So. 477 (1918); Everett v. Clayton, 211 La. 211, 29 So. 2d 769 (1947). (5) The judgment of possession is only *prima facie evidence* of the relationship to the deceased of the parties recognized therein as the heirs or legatees, and of their *rights to the possession* of the property that *belonged to the deceased at the time of his death*, but which now belongs to them. LA. CODE OF CIVIL PROCEDURE art. 3062 (1960).

It is evident therefore that co-heirs are co-owners in indivision from the moment of the death of the deceased and that they do not become such by virtue of the judgment of possession. Although collation is said to be due "only to the *succession* of the donor" (LA. CIVIL CODE art. 1242 (1870)) what is meant is that collation is the return to the mass of the *succession as defined in Article* 872 of the Civil Code, viz.: "the estate . . . which a person leaves after his death." It seems inaccurate to say, therefore, that the heirs become co-proprietors of the property which before the judgment of possession *belonged to the succession.*

valid judgment of possession had already been rendered. But the plaintiff also alleged that some of the so-called donations were in fact pure and simple simulations. As to these, the court properly concludes that the plaintiff had the right to re-open the succession in order to include in the inventory of the effects thereof, the property alleged to have been the subject of the simulations, since a simulation conveys nothing and consequently the property is deemed never to have left the estate of the deceased. This, the court pointed out, did not imply a nullity, but rather an incompleteness in the succession proceedings, and therefore the plaintiff should have the opportunity to be sent into possession of the property not included in the original judgment of possession.

Interpretation of Legacies

In *Giroir v. Dumesnil*[46] the testator bequeathed to his wife the "enjoyment and usufruct during her life span of all the property * * * which I may possess at my death, for her to do with, enjoy and dispose of as she pleases, and as a thing belonging to her." The issue was, naturally, whether the bequest was of a usufruct only, or whether it was a bequest in full ownership. Reversing the court of appeal which had held that there was no ambiguity in the disposition and that the bequest was of the usufruct only, the Supreme Court finds the disposition was ambiguous and resolves the ambiguity in favor of a disposition in perfect ownership, taking into consideration not only the scope of the disposition itself[47] but also the circumstances from which the probable intention of the testator could be deduced.[48] That the testator used a prolix method of describing ownership[49] and that he only approximated the strict legal meaning of usufruct, said the court, did not preclude such a construction.

In *Succession of Mulqueeny*[50] the testator bequeathed $5,000

46. 248 La. 1037, 184 So. 2d 1 (1966).

47. "There is no doubt the testator intended the will to cover his community property interest. If this is true, then it would be highly extraordinary for him to bequeath his wife only the usufruct of his share of the community property, when without a will she would have inherited this property in full ownership." (*Id.* at 1051, 184 So. 2d at 6).

48. The testimony disclosed that the deceased did not have close relationship with his collateral relatives, and that it was the mutual understanding of the testator and his wife, who had made reciprocal wills in favor of each other, that the survivor would take all of the property the other possessed.

49. "We conclude [that the words] mean that the testator bequeathed to his wife the perfect ownership of his property: use, enjoyment of the fruits, and right of disposition." (248 La. at 1054, 184 So. 2d at 7).

50. 248 La. 659, 181 So. 2d 384 (1965).

to each of his three nieces, and to a longtime friend whom he named as his executrix, he bequeathed "any and all homestead stock, or any interest I may have therein" in the various building and loan associations listed, which totalled some $60,000.[51] The amount of ready cash in the succession of the deceased was only $167.20 which was patently insufficient to satisfy the legacies to the nieces who contended that their legacies should be paid from the homestead stock since in legal contemplation, such stock was nothing but cash. The position of the executrix, with whom the court of appeal had agreed,[52] was that by virtue of article 1635 of the Civil Code[53] the legacy of stock, being a legacy of a particular object, had to be paid by preference with the result that the legacies of the money had failed because of the inadequacy of the succession assets. The Supreme Court reversed, holding that building and loan association stock merely represents cash on deposit to the credit of the "shareholder" subject to withdrawal at any time and as such, no different from any other ordinary bank deposit.[54] So holding, and by applying the usual rules of interpretation of testaments,[55] the court had no difficulty in reaching the conclusion that it was the evident intention of the testator that the executrix should receive only the residue of the homestead deposits after the cash legacies had been satisfied.

51. See the Per Curiam *id.* at 675, 181 So. 2d at 390.

52. Succession of Mulqueeny, 172 So. 2d 326 (La. App. 4th Cir. 1965).

53. LA. CIVIL CODE art. 1635 (1870): "If the effects do not suffice to discharge the particular legacies, the legacies of a certain object must be first taken out. The surplus of the effects must then be proportionately divided among the legatees of sums of money. . . ."

54. "This type of building and loan 'stock' or 'shares' has been characterized by this court as 'merely a deposit of a sum of money at a fixed rate of interest, the principal and interest being all subject to withdrawal at any time.' Succession of Homan, 202 La. 591, 605, 12 So. 2d 326 (1943)."

The court also took occasion to re-affirm its decision in Succession of Berdon, 202 La. 607, 12 So. 2d 654 (1943) that the legacy of the stock was not legacy of a certain object because it was not a legacy of a "definitely designated certificate of stock." This case was disapproved in *The Work of the Louisiana Appellate Courts for the 1942-1943 Term — Successions*, 5 LA. L. REV. 516, 520 (1944).

55. LA. CIVIL CODE art. 1712 (1870): "In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament."

Id. art. 1713: "A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none."

Id. art. 1715: "When, from the terms made use of by the testator, his intention can not be ascertained, recourse must be had to all circumstances which may aid in the discovery of his intention."

Another case in which the above articles were applied was Succession of Davis, 178 So. 2d 481 (La. App. 1st Cir. 1965) in which the court had little difficulty in concluding that a legacy of "my home at 818 West 3rd St." included not only the lot on which the home had been built, but also adjoining lots subsequently purchased by the testator and incorporated therewith as part thereof.